STATE OF MICHIGAN

COURT OF APPEALS

SPRUCE RUN, LLC, and 600 FOWLERVILLE RD., LLC, Plaintiffs-Appellants, v FIRST NATIONAL BANK IN HOWELL, Defendant-Appellee.	UNPUBLISHED March 15, 2011 No. 296754 Livingston Circuit Court LC No. 09-024509-CZ

Before: FITZGERALD, P.J., and O'CONNELL and METER, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a grant of summary disposition to defendant under MCR 2.116(I)(2). We affirm.

Plaintiff companies each consisted of two component members: plaintiff Spruce Run consisted of Blue Spruce Grove, LLC, and Gottschalk & Black Investments Limited (G&B), and plaintiff Fowlerville consisted of SSC Fowlerville, LLC, and G&B. Dale Cooper was the manager of Blue Spruce Grove, LLC, and SSC Fowlerville, LLC. The operating agreements for plaintiffs indicated that no mortgages involving substantially all the property of the companies were to be entered into "by any Manager on behalf of the Company, except by the unanimous consent of all Members . . . ."

Plaintiffs filed this lawsuit after G&B mortgaged the real-estate assets of each plaintiff in order to obtain two separate loans from defendant and after defendant initiated foreclosure proceedings. Plaintiffs contended that G&B had no authority to encumber the properties under the terms of the operating agreements. Defendant contended that G&B held itself out as having the authority to encumber the properties. It argued, among other things, that equitable estoppel precluded the invalidation of the mortgages. The trial court ruled that defendant, in making the encumbrances, had received adequate proof of the consent of plaintiffs. Accordingly, the court denied the motion for partial summary disposition that plaintiffs had filed under MCR 2.116(C)(10) and granted summary disposition to defendants under MCR 2.116(I)(2).

Plaintiffs contend that the trial court should have granted their motion. We review de novo a trial court's decision regarding a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Summary disposition may be granted under MCR 2.116(C)(10) when "there is no genuine issue as to any material fact, and the moving party is

entitled to judgment . . . as a matter of law." MCR 2.116(I)(2) states: "If it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party."

As noted in *Adams v Detroit*, 232 Mich App 701, 708; 591 NW2d 67 (1999), "[e]quitable estoppel arises where one party has knowingly concealed or falsely represented a material fact, while inducing another's reasonable reliance on that misapprehension, under circumstances where the relying party would suffer prejudice if the representing or concealing party were subsequently to assume a contrary position."

With respect to the Spruce Run transaction, defendant had a "limited liability company authorization resolution," dated December 29, 2004, stating that either G&B or Blue Spruce Grove, LLC, could mortgage the property of plaintiff Spruce Run. Dale Cooper's signature is on this resolution. This resolution provided the basis for equitable estoppel. Defendant accepted the representations made in the resolution and relied on them to make an $800,000 loan. Prejudice would result to defendant if the mortgage were to be invalidated after plaintiff Spruce Run's then-managers, Dennis Gottschalk and Jay Black, made material representations relating to it.

Plaintiffs contend that this resolution should not be relied on in the present appeal because it was superseded by another resolution that was not signed by Cooper. We disagree. This second Spruce Run resolution stated that it was superseding a "resolution dated 12-23-04." Defendant's representative, Dennis Gehringer, indicated that he did not know of a "12-23-04" resolution, and no party has identified one.[1] We will not require defendant to have assumed that the later resolution was intended to supersede the resolution signed by Cooper and dated December 29, 2004, not December 23, 2004.

Plaintiffs also contend that the original resolution should not be relied on in the present appeal because Gehringer admitted that Gottschalk, a manager of G&B, made alterations to the document that were not expressly assented to by Cooper. However, the alterations were immaterial to the question of G&B's authority to enter into the mortgage. Even *without* the alterations referred to by plaintiff, the resolution still plainly indicated that either Blue Spruce Grove, LLC, *or* G&B could mortgage the property of plaintiff Spruce Run. Accordingly, plaintiffs' reliance on the alterations is misplaced.

Defendant relied on the representations made to it in order to make the loan at issue. Plaintiffs are equitably estopped from invalidating the mortgage.[2]

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[1] At any rate, even if the later resolution were applied to the transaction, we would still find no basis for reversal. The same analysis as applied to the Fowlerville transaction, *infra*, would apply.

[2] Plaintiffs may possibly have a cause of action against G&B for acting improperly, but we express no opinion concerning that subject.

With regard to the Fowlerville property, a resolution similar to the original Spruce Run resolution was signed by Gottschalk and Cooper. However, defendant admits that while it relied on this resolution to make two loan modifications with regard to the Fowlerville loan, in making the original loan it relied on a different resolution – one that was signed only by Gottschalk and by Black (the other manager of G&B). The resolution stated that "[t]he resolutions on this document are a correct copy of the resolutions adopted at a meeting of all members of the Limited Liability Company or the person or persons designated by the members of the Limited Liability Company to manage the Limited Liability Company as provided in the articles of organization or an operating agreement, duly and properly called and held on April 4, 2005 . . . ." The resolution indicated that Black and Gottschalk were authorized to mortgage the Fowlerville property, with only one signature required.

The operating agreement of plaintiff Fowlerville stated:

> Notwithstanding any other provision of this Operating Agreement, no act shall be taken, sum expended, decision made, obligation incurred, or power exercised by any Manager on behalf of the Company, except by the unanimous consent of all Members, with respect to (a) any significant and material purchase, receipt, lease, exchange, or other acquisition of any real or personal property or business; (b) the sale of all or substantially all of the assets and property of the Company; (c) any mortgage, grant of security interest, pledge, or encumbrance on all or substantially all of the assets and property of the Company;[3] (d) any merger; (e) any amendment or restatement of the Articles or this Operating Agreement; (f) any matter that could result in a change in the amount or character of the Company's capital; (g) any change in the character of the business and affairs of the Company; (h) the commission of any act that would make it impossible for the Company to carry on its ordinary business and affairs; or (i) any act that would contravene any provision of the Articles, Operating Agreement, or the Act.

The operating agreement also stated:

> The business and affairs of the Company shall be managed by and under the authority of a Manager or Manager appointed by the Members. There shall not be less than one nor more than three Managers. The initial Managers shall be **Jay J. Black and Dennis Gottschalk**. . . .
>
> Except as may otherwise be provided in this Operating Agreement, the ordinary and usual decisions concerning the business and affairs of the Company shall be made by the Managers. Each Manager has the power, on behalf of the Company, to do all things necessary or convenient to carry out the Company's business and affairs, including the power to (a) purchase, lease or otherwise

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[3] The encumbrances here encompassed substantially all the assets of plaintiff companies.

> acquire any real or personal property, (b) sell, convey, mortgage, grant a security interest in, pledge, lease, exchange, or otherwise dispose of or encumber any real or personal property; (c) open one or more depository accounts and make deposits into, write checks against, and make withdrawals against such accounts; (d) borrow money and incur liabilities and other obligations; (e) enter into any and all agreements and execute any and all contracts, documents, and other instruments . . . . [Emphasis in original.]

In resolving the issue surrounding the Fowlerville mortgage, we, like defendant, find instructive the case of *Morales v Auto-Owners Ins Co*, 458 Mich 288; 582 NW2d 776 (1998). In *Morales*, *id*. at 290-291, the plaintiff had an automobile insurance policy with the defendant that was automatically renewed for nearly six years, even though the plaintiff often paid his bill late. After the plaintiff was injured in an automobile accident, the defendant argued that the insurance policy was not in place because the contract had a provision indicating that the policy would be terminated for late payments. *Id*. at 292, 294-295. The Michigan Supreme Court held:

> Defendant repeatedly accepted plaintiff's late payments and continually renewed the plaintiff's policy. As a result, we agree with plaintiff that the principle of equitable estoppel bars defendant from enforcing the automatic nonrenewal provision of the insurance contract.
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> * * *
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> [T]he defendant, through its consistent acceptance of plaintiff's late payments and its previous reluctance to enforce the automatic nonrenewal provision, "induced in the mind of the insured an honest belief that the terms and conditions of the policy, declaring a forfeiture in the event of nonpayment . . . [would] not be enforced" . . . .
>
> The principle of estoppel, as applied in this case, prevents the defendant from enforcing a single provision in the already existing contract. [*Id*. at 295, 298 (citation omitted).]

In the present case, Gottschalk and Black, as the then-managers of plaintiff Fowlerville, represented that the company had resolved to allow them to encumber the Fowlerville property, and defendant relied on this representation to make a $410,000 loan. While it is true that this was in contravention of Fowlerville's operating agreement, it was not unreasonable for defendant to rely on a resolution presented by plaintiff Fowlerville's managers. Like in *Morales*, Gottschalk and Black's actions prevent a contractual provision from being enforced under the

principles of equity. The bank relied on the resolution and would suffer prejudice if the mortgage were to be invalidated. We find no basis on which to disrupt the trial court's ruling.[4]

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell
/s/ Patrick M. Meter

[4] Plaintiffs take issue with certain specific aspects of the trial court's ruling. However, even if the trial court erred in certain respects, affirmance is still appropriate. See, e.g., *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000). We also note that the equitable resolution in favor of defendant garners even more support in light of the later Fowlerville resolution that allowed G&B's actions and was signed by Cooper.